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In the Supreme Court of the United States

October Term, [illegible]

No. [illegible]

Inter-Island Steam Navigation Company, Limited,

Petitioner,

v.

Territory of Hawaii, by the Public Utilities Commission of the Territory of Hawaii,

Respondent.

Brief for Respondent in Opposition to the Petition for Certiorari

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OPINIONS OF COURTS BELOW

The opinion of the Supreme Court of Hawaii on questions of law reserved by the Trial Court was filed October 8, 1931 (R. 13-28), and is reported in 32 Haw. 127. The opinion of the Trial Court filed April 12, 1934, is not reported and appears at R. 45-65. The opinion of the Supreme Court of Hawaii on writ of error was filed

July 25, 1936 (R. 259-284), and is reported in 33 Haw. 896. The opinion of the Circuit Court of Appeals filed April 16, 1938 (R. 318-337), is reported in 96 F. 2d 412.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 16, 1938. The petition for a writ of certiorari was filed on June 6, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (28 U.S.C. Sec. 347).

STATEMENT

The following additional statement will aid in clarifying the issues raised by the Petitioner:

The Public Utilities Commission of the Territory of Hawaii (referred to herein as the "Commission") was created by and operates pursuant to the provisions of Act 89, S. L. Haw. 1913, which Act, as amended by Act 127, S. L. Haw. 1913, became effective on July 1, 1913, and is referred to herein as the "Utilities Act of 1913."*

Section 13 of the Utilities Act of 1913 (Sec. 2201, R. L. Haw. 1925, *infra*, Appendix p. ii) provided in part:

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* This Act became chapter 132 of R. L. Haw. 1925. The chapter is summarized in the Petitioner's brief, Appendix i to vi, but the Petitioner has failed to quote the provisions of Section 13 of the Act (Section 2201, R. L. Haw. 1925) providing for the investigation of federally regulated utilities, which section was the basis for the four lower court decisions contrary to the Petitioner's contentions. A table showing the original sections of the Act and the corresponding sections of R. L. Haw. 1925, is contained herein in Appendix i.

"The commission shall have power to examine into any of the matters referred to in Section 2193 (Section 5 of this Act) *notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body,* and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise *before the interstate commerce commission, or such court or other body,* in its own name or in the name of the Territory, . . ." (Italics ours.)

The duty is given the Commission by Section 17 of said Act, as amended by provisions of Act 127, S. L. Haw. 1913 (Sec. 2207, R. L. Haw. 1925, Pet. Br., Appendix p. iv), to collect from each utility "which is subject to investigation by the commission" semiannual fees measured by gross receipts and by the outstanding capital stock of the utility subject to investigation. These fees are required to be placed into a fund appropriated for the salaries, wages and authorized expenses of the Commission.

At the time of the creation of the Commission in 1913, and at all times thereafter, railroads operating wholly in the Territory have been subject to the regulatory jurisdiction of the Interstate Commerce Commission.* Since 1913 Congress has from time to time provided for the regulation of various public utilities in the Terri-

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*The statutes relating to federally regulated utilities other than the Petitioner are referred to in the Argument, *infra,* p. 15-16.

tory by the several Federal agencies, and in the case of telephone companies, returned the regulatory jurisdiction to the local Commission after such jurisdiction had been vested in the Interstate Commerce Commission for 14 years. No Act of Congress providing for Federal regulation of local utilities has expressly provided that the Commission should be divested of its power of investigation given by the Utilities Act of 1913, which power was ratified by Congress, as hereafter shown.

Prior to the effective date of the Utilities Act of 1913, the Territorial Legislature adopted Act 135, S. L. Haw. 1913 (reprinted Pet. Br., Appendix p. vi), to become effective upon its approval by the Congress of the United States, for the express purpose of making the Utilities Act of 1913 applicable to public utilities operating in the Territory under congressionally approved franchises and for the express purpose of having the approval of territorial investigation of federally regulated utilities.

By Act of March 28, 1916, c. 53, 39 Stat. 38 (reprinted Pet. Br., Appendix p. viii), Congress amended and ratified Act 135, S. L. Haw. 1913, and confirmed and approved the Utilities Act of 1913 by making the same applicable in all respects to "all public utilities and public-utilities companies organized or operating within the Territory of Hawaii." The Act of Congress amending and ratifying Act 135, S. L. Haw. 1913, reads in part as follows:

> "The franchises granted by (various territorial acts approved by Congress) *and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating*

within the Territory of Hawaii, and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory * * * *Provided, however, That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce* * * *"* (Italics indicate additions to Act 135, S. L. Haw. 1913, made by Congress).

By the Act of September 7, 1916, 39 Stat. 728, (U.S.C. Tit. 46, s. 301, *et seq.* summarized in Petitioner's brief, Appendix pp. xi-xvi) (hereinafter referred to as the "Shipping Act, 1916") there was created the United States Shipping Board with certain regulatory powers over carriers engaged in transportation by water of passengers or property between places in the same territory. Petitioner relies on the Shipping Act, 1916, for its position that as a matter of statutory construction the Commission has been divested entirely of its powers to investigate and collect the statutory fees.

Beginning in 1913 all public utilities operating in the Territory of Hawaii, whether or not operating under congressionally approved franchises and whether or not regulated by Federal agencies, paid to the Commission all of the fees prescribed by the Utilities Act of 1913 (R. 69, 88); and all such public utilities except the Petitioner have at all times since then continued to pay the statutory fees (R. 69). Beginning with the year 1923 the Petitioner contended that the Utilities Act of

1913 had no application to it and that the Commission was without jurisdiction to make the investigations authorized under said Act (Stip. of Counsel, R. 44).

This action was brought to compel the Petitioner to pay the statutory fees in order to provide the necessary funds to enable the Commission to carry out its powers and duties under the Utilities Act of 1913. The Supreme Court of the Territory of Hawaii in a decision rendered on reserved questions (*Territory v. I.I.S.N. Co.*, 32 Haw. 127, R. 12), held that the Shipping Act, 1916, did not divest the Commission of its power or duty to examine into and investigate the business of the Petitioner and that since the utility was subject to investigation by the Commission it was obligated to pay the statutory fees.

On the trial of the cause the Commission introduced evidence showing that all utilities (whether or not federally regulated) operating in the Territory, other than the Petitioner, paid the statutory fees (R. 69, 88); that the total fees paid to the Commission have been insufficient to pay the expenses for carrying on the work of the Commission (R. 70); that from time to time between 1913 and 1929 the Legislature of the Territory of Hawaii appropriated sums of money amounting in all to $38,000 in order to carry on the work of the Commission (R. 70), including a specific appropriation of $5,000, which was set apart for the purpose of paying the expense in connection with the litigation of the position taken by the Petitioner (R. 108-109); that no portion of the fees paid has ever gone into the general revenues of the Territory (R. 70). There was evidence that during 1916 and 1917, the years in which the Petitioner was paying the statutory fees, the Commission expended on account of an investigation of the Peti-

tioner an amount greatly in excess of the fees paid by the Petitioner during those years (R. 71, 124-125). It was stipulated (R. 48-49) that the Commission did not investigate the Petitioner during the period in question (during which the Petitioner insisted the Commission lacked power to investigate), and that the Petitioner made no reports to the Commission except that the auditor examined the Petitioner's books to ascertain for purposes of the litigation the statutory fees claimed (R. 48). The Petitioner rested on evidence that the reasonable value of the auditor's services in ascertaining the fees claimed to be due did not exceed $30 (R. 103).

Evidence was introduced by Petitioner to show that, although the Petitioner is a domestic corporation whose business is entirely conducted within the territorial limits (R. 196-197) and although Petitioner has no through rates, no through bills of lading and does entirely a local business (R. 197), a portion of its freight after delivery by the Petitioner is transported to the mainland of the United States or to foreign countries and likewise a portion of the freight that it receives for transportation before delivery to the Petitioner is received in the Territory of Hawaii from foreign countries or the mainland of the United States (R. 183-198). The portion of Petitioner's gross utilities revenues attributable to such freight was computed at approximately 42% of such revenues (R. 327).

The Trial Court ruled that Congress, by the enactment of Act of March 28, 1916, expressly ratified and approved the Utilities Act of 1913, and adopted the Commission as its agency to have the powers prescribed over utilities as set out in the Act, and approved the measure of the fees as set forth in the Act (R. 57-62),

and that it was not necessary to consider the incidental effect, if any, of the exaction of the fees upon interstate and foreign commerce (R. 58); that the fees were not shown to be disproportionate to the service required of the Commission (R. 61-62).

The Supreme Court of the Territory of Hawaii found that there had been no showing that the fees prescribed to enable the Commission to perform its duties under the Act were disproportionate to the services required to be performed, and that the making of an investigation was not a condition precedent to the collection of the fees, and that if they were not unreasonable they did not burden interstate or foreign commerce (R. 261, 267).

The Circuit Court of Appeals found that Congress had expressly ratified the Act creating the Commission (R. 330); and further held that if it be assumed that the Commission had no power to investigate the Petitioner in the conduct of interstate commerce (which matter the Court stated it did *not* decide) (R. 333) still the Petitioner conducted a large purely intra-territorial business which had no relationship to interstate commerce, and that even assuming that the investigatory power of the Commission was limited to this field, the Petitioner could be required to pay the statutory fees (R. 334). The Circuit Court of Appeals further held, after giving consideration to the recently decided cases of *Great Northern Railway Co. v. State of Washington*, 300 U. S. 154, 160, and *Bourjois, Inc. v. Chapman*, 301 U. S. 183, 187, that upon the record of past income and expenses, there was a clear showing that the fees prescribed by the statute were not unreasonable or disproportionate (R. 336).

QUESTIONS PRESENTED

1. Where Congress by Act of March 28, 1916, amends and ratifies a territorial statute, and thereby approves investigations by the Territorial Public Utilities Commission of all federally regulated local public utilities (including franchised railroads subject in all respects to the jurisdiction of the Interstate Commerce Commission), does a subsequent Act of Congress, making the jurisdiction of the Shipping Board applicable to intra-territorial carriers by water, divest the Territorial Public Utilities Commission of its power to investigate such carriers in the absence of a conflict between the terms of the Shipping Act and the congressionally approved territorial Act?

2. Where congressional approval is shown to the exaction of non-discriminatory utilities fees from all local utilities to the Territorial Public Utilities Commission, to be used to pay the expense of regulation of local utilities not federally regulated and the expense of investigation of local utilities which are federally regulated, is it any defense to an action for the collection of such fees that the fees are measured in part by gross receipts from freight alleged to be carried in interstate or foreign commerce?

3. Can a public utility, which refuses to permit investigation by the Territorial Public Utilities Commission of its business and affairs, and which refuses to pay the statutory fees to the Commission to enable the Commission to make such investigations, be permitted to defend an action for statutory fees on the ground that no investigations were made by the Commission during the period of the utility's refusal to pay the fees?

SUMMARY OF ARGUMENT

The courts below found no conflict between the jurisdiction of the Shipping Board and the claimed jurisdiction of the congressionally sanctioned and approved territorial agency, the Public Utilities Commission. The Petitioner, by failing to keep clear the distinction between a state and a territory, whose powers are derived from and are in all respects dependent upon Congress, attempts to show a conflict with Supreme Court decisions and an encroachment upon the Petitioner's constitutional rights. The validity of the decisions of the courts below and the insufficiency of the petition are clearly established if the distinction between a state and a territory is borne in mind.

The territorial Utilities Act of 1913 provides that the business of all public utilities operating in the Territory of Hawaii, whether their rates and practices be regulated by the local Public Utilities Commission or by a Federal agency, shall be subject to investigation by the Commission. Where a public utility is subject to rate regulation by a Federal agency, it is made the duty of the local Commission after investigation to institute proceedings before the Interstate Commerce Commission or other body or court to correct the matters coming within the jurisdiction of such Federal agency. There is imposed upon all public utilities operating in the Territory and subject to investigation statutory fees measured by gross income and by outstanding capital stock of each utility. Under the Utilities Act of 1913 these fees must be used to defray the expenses of the Commission.

Congress, with plenary power over the affairs of the Territory, has ratified and approved the territorial legislation and by its own amendment confirmed its

application to all public utilities organized or operating within the Territory of Hawaii. The ratification by Congress of the Utilities Act of 1913 disposes of every contention that the territorial law is invalid because it constitutes a burden on interstate or foreign commerce. The Respondent submits that there is no inconsistency between the Utilities Act of 1913 as approved by Congress and the Shipping Act of 1916; that it affirmatively appears from the record that the exactions imposed by the statute are not more than sufficient and are probably insufficient in amount to enable the Commission to perform its duties with regard to the Petitioner; that the Utilities Act of 1913 is not a revenue raising measure and legislative appropriations have been necessary from time to time to enable the Commission to perform its duties; that the Petitioner has completely failed in any respect to show that the fees are known to be unreasonable or have proven to be in excess of the amount needed to pay for the inspection services required to be rendered; that the Petitioner has failed to show discrimination or arbitrary administration, and in fact seeks in this case to gain an advantage over the other utilities by illegally refusing to pay the fees necessary to enable the Commission to investigate and by refusing to comply with the Act under the claim that it is not applicable to its business; that the case is controlled by the principles announced in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, 481, which would have to be overruled to sustain Petitioner's position; that no conflict has been shown with the decision in *Great Northern Railway Co. v. State of Washington*, 300 U. S. 154. The petition should be denied because no substantial Federal question is raised.

I.

THE TERRITORIAL POWER TO INVESTIGATE AND COLLECT STATUTORY FEES FROM THE PETITIONER CANNOT CONSTITUTE AN UNCONSTITUTIONAL BURDEN ON INTERSTATE AND FOREIGN COMMERCE, BECAUSE THE POWER TO INVESTIGATE AND THE MEASURE OF THE FEES HAVE IN ALL RESPECTS BEEN APPROVED BY ACT OF CONGRESS.

Petitioner claims a constitutional immunity because certain of its freight before or after transportation by the Petitioner is carried by other carriers in interstate and foreign commerce (Pet. Br. 20, 23).

The facts are not disputed. The Petitioner is a Hawaiian corporation, doing business only within the Territory of Hawaii, with no through rates, through contracts, or trans-shipment contracts (Stip. of Counsel, R. 42, 198). All of its engagements and undertakings are completely performed in the Territory of Hawaii (R. 51-52).

The statute on its face shows that it was the legislative intention to empower the regulation and investigation of all utilities operating in the Territory to the full extent that the same would be permitted under the Constitution and the laws of the United States. The Territorial Legislature recognized that Congress with plenary power over the Territory might from time to time place the regulatory jurisdiction over any utility at any time and in any respect in some commission, body or board other than the local Commission.

By Section 4 of the Utilities Act of 1913 (Sec. 2192, Ch. 132, R. L. Haw. 1925) the Commission was given

general supervision "hereinafter set forth over all public utilities doing business in the Territory, . . .". Section 5 of the Act (Sec. 2193, Ch. 132, R. L. Haw. 1925) defines the Commission's powers of investigation and gives power "to examine into the condition of each public utility doing business in the Territory," and "its compliance with all applicable territorial and Federal laws. . . ." Section 13 of the Act (Sec. 2201, Ch. 132, R. L. Haw. 1925) provides that the Commission may make recommendations and bring suits and provides further that—

> "The Commission shall have power to examine into any of the matters referred to in section 2193, *notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body*, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the Territory, or in the name or names of any complainant or complainants, as it may deem best." (Italics ours.) (See *infra* Appendix p. ii.)

Section 14 of the Act (Sec. 2202, Ch. 132, R. L. Haw. 1925) gives the Commission jurisdiction to fix rates, fares, charges, classifications, rules and practices "insofar as it is not prevented by the constitution or laws

of the United States." Section 17 of the Act (Sec. 2207, Ch. 132, R. L. Haw. 1925) provides for the collection of fees to be paid by "each public utility which is subject to investigation by the commission." The fees were required to be paid into a special fund called the "Public Utilities Commission Fund," which fund is expressly appropriated for the payment of all salaries, wages and expenses authorized or prescribed by the Chapter. Section 18 of the Act (Sec. 2208, Ch. 132, R. L. Haw. 1925) defines the term "public utility" to "mean and include every person, company or corporation, who or which may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air between points within the Territory, or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

The Petitioner operating solely "between points within the Territory" is expressly included within the definition in Section 18, and a conflict with the Constitution or laws of the United States must be affirmative and clearly shown if the Petitioner is to be relieved from the duties expressly imposed by the statute.

Ratification and Approval by Congress

The Petitioner takes sharp issue with the holding of the Trial Cour. and the Circuit Court of Appeals that the congressional approval contained in the Act of March 28, 1916, 39 Stat. 38, c. 53 (Pet. Br., Appendix p. viii) had application to the Petitioner. The clear language of the Act of Congress and the circumstances under which the Act of Congress was adopted make it perfectly clear that Petitioner's contentions in this behalf are wholly without foundation and present no substantial question for consideration by this Court.

In 1913 when the Utilities Commission was created, railroads operating wholly within the Territory of Hawaii were subject in all respects to the regulatory jurisdiction of the Interstate Commerce Commission under the provisions of the Act of June 29, 1906, 34 Stat. 584, c. 3591 (U.S.C. Tit. 49, s. 1) amending the Interstate Commerce Act; and such railroads have since annexation of Hawaii been subject to the detailed regulatory provisions governing almost every field of railroad operation contained in the Federal Safety Appliance Acts, (Act of March 2, 1893, c. 196, as amended by Act of March 2, 1903, c. 976, U.S.C. Tit. 45, s. 8 et seq.). The regulation of telephone companies operating in the Territory of Hawaii was placed under the jurisdiction of the Interstate Commerce Commission by the Act of February 28, 1920, 41 Stat. 456, and remained under such jurisdiction until the enactment by Congress of the Act of June 19, 1934, c. 652, s. 602(b), 48 Stat. 1102, when jurisdiction was revested in the local Commission. Many other detailed regulatory Federal statutes have from time to time been made expressly applicable

to the utilities operated wholly within the Territory of Hawaii.*

The close relationship between the territorial and Federal governments was given recognition in the Utilities Act of 1913 and the Commission was expressly authorized and directed to investigate among other things *the compliance of the local utilities with all applicable Federal laws* with the duty of protecting the public by either making its own orders if the matter were in its regulatory power or by bringing proper proceedings before the Interstate Commerce Commission or such court or other body as might be appropriate. The distance of Hawaii and the difficulty of individual complaint furnishes ample legislative motive for the passage of the Utilities Act of 1913 in the form in which it was enacted.

To accomplish congressional ratification of the application of the Utilities Act of 1913 to utilities operating under franchises approved by Congress and utilities federally regulated, the 1913 Territorial Legislature enacted Act 135, S. L. Haw. 1913 (reprinted Pet. Br., Appendix p. vi) to become effective upon its approval by the Congress of the United States. It should be noted, as was pointed out by the Trial Court, that in Act 135, S. L. Haw. 1913, all franchises which had theretofore been approved by Congress are specifically

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* As examples: Bills of Lading Act, Act of August 29, 1916, 39 Stat. 538, U.S.C. Tit. 49, Sec. 81 et seq.; Employees Compensation Act, Act of April 22, 1908, 35 Stat. 65, U.S.C. Tit. 45, Sec. 52 et seq.; Hours of Service of Employees, Act of March 4, 1907, 34 Stat. 1415, U.S.C. Tit. 45, Sec. 61 et seq.; Air Commerce Act of 1926; Act of May 20, 1926, 44 Stat. 568, U.S.C. Tit. 49, Sec. 171 et seq.

mentioned and referred to by Act number and approval date (R. 64). In 1916, when Congress had before it for consideration, ratification and approval of Act 135, S. L. Haw. 1913, Congress amended the Act by inserting additional provisions in Act 135, S. L. Haw. 1913, extending the scope thereof *to include and cover all public utilities organized or operating within the Territory of Hawaii.* By the Act of March 28, 1916, 39 Stat. 38, c. 53 (reprinted Pet. Br., Appendix p. viii) Congress amended Act 135 by adding the language which is italicized hereunder so that said Act of Congress reads in part as follows:

> "... *and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii,* and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory; ..." (Italics ours.)

Congress also added the following proviso to Act 135, S. L. Haw. 1913:

> "*Provided, however,* That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce."

The power of Congress in the exercise of its constitutional powers to amend and extend the provisions of

Act 135, S. L. Haw. 1913, and to confirm the applicability of the Public Utilities Act of 1913, has never been denied or doubted. *France v. Connor,* 161 U. S. 65, at 72; *Mormon Church v. U. S.,* 136 U. S. 1; *National Bank v. Yankton County,* 101 U. S. 129.

The Petitioner urges that under "the fundamental rule of *noscitur a sociis,*" the Act of Congress has application only to franchised corporations (Pet. Br. 34).

The mere reading of the statute would demonstrate that the decision of the Trial Court on this matter (R. 64), quoted hereunder is unassailable:

> "Where language in an act is plain and unambiguous it needs no construction: In re the suggested application of the doctrine 'nocitur a sociis' argued by counsel, the court calls attention to the following cases raising other principles of construction. The act of Congress under construction as well as the original act of the legislature of Hawaii (135, L. 1913) recited all the territorial legislature franchise acts then in existence, see R. L. 1925 Vol. II, p. 1980 et seq. The general language then following in the act of Congress which was added by Congress, would have no meaning if confined to term 'franchise.' The obvious, express class is, 'all public utilities operating in the Territory.' This is plain and all conclusive. It needs no 'construction'; nor can the title restrict the plain language thereof.
>
> "See U.S. v. Fisher, 2 Cranch 358, 385-397 (Marshall, Ch. J.); 2 L. ed. 304, 313-317. Pennock v. Dialogue, 2 Peters 1, 7 L. ed. 327. Yerke v. U. S., 173 U. S. 439, 43 L. ed. 760. Texas v. Chiles, 21 Wall. 488, 22 L. ed. 650. Boudinot v. U. S., 11 Wall.

616, 20 L. ed. 227. Lewis v. U. S., 92 U. S. 618, 23 L. ed. 513. U. S. v. Ewing, 184 U. S. 140, 46 L. ed. 471. American Express Co. v. U. S., 212 U. S. 522, 53 L. ed. 635. Caminetti v. U. S., 242 U. S. 470, 61 L. ed. 442. Commissioner v. Gottlieb, 265 U. S. 310, 68 L. ed. 1031." (*Decision, Trial Ct., R. 64.*)

The Approval by Congress of the Provisions of the Act is Controlling

When Congress approves the exaction of fees by confirming the applicability of the Utilities Act of 1913 in all respects to all utilities operating in the Territory, all discussions of "burdens upon interstate or foreign commerce" are made superfluous. The Court may take judicial knowledge of the fact that virtually all carriers for hire in the Territory of Hawaii carry materials which are either received after trans-shipment or are to be trans-shipped into interstate or foreign commerce. The investigation fees are based in part on gross receipts from the utility business within the Territory of Hawaii. There can be no question but that Congress is acting constitutionally when it directs the exaction of fees measured by gross utility income because Congress has plenary power over interstate and foreign commerce (U. S. Constitution, Art. 1, s. 8, cl. 3) and also has plenary power over the Territory (U. S. Constitution, Art. 4, s. 3, cl. 2).

The constitutionality of the congressional assent to *state* regulation of interstate and foreign commerce and the validity of such regulation after congressional assent has been firmly established.

In Re Rahrer, 140 U. S. 545;

Pabst Brewing Co. v. Crenshaw, 198 U. S. 17;

Phillips v. Mobile, 208 U. S. 472;

DeBary & Co. v. La., 227 U. S. 108 (foreign commerce);
Foppiano v. Speed, 199 U. S. 501.

If a *state* may with congressional assent tax or regulate interstate commerce, a territory clearly may with such assent exact non-discriminatory public utilities fees.

At the time of the adoption of the Act of March 28, 1916, there was already a settled administrative construction by the Commission of the provisions of the Utilities Act of 1913. The Commission had collected from, and all utilities operating within the Territory (including the Petitioner) had paid and continued to pay all of the fees prescribed by the Utilities Act of 1913 regardless of the nature of the freights carried, and regardless of the fact that the regulatory power over some utilities had been vested in a Federal agency (R. 69, Ex. A; R. 88, 92).

If there were any question as to the congressional intention, the settled prior administrative construction of the Utilities Act would be determinative of the proper construction to be put on the Act as it was approved by Congress.

New York, etc., R. Co. v. Interstate Commerce Commission, 200 U. S. 361;
Komada & Co. v. U. S., 215 U. S. 392;
St. Paul, etc., Ry. Co. v. Phelps, 137 U. S. 528;
Heiner v. Colonial Trust Co., 275 U. S. 232.

II.

THE ENACTMENT BY CONGRESS OF THE SHIPPING ACT OF 1916, DID NOT DIVEST THE LOCAL COMMISSION OF ITS POWERS OF INVESTIGATION OR ITS DUTY TO COLLECT THE FEES PROVIDED TO PERMIT SUCH INVESTIGATION.

The Territorial Supreme Court in 1917 held that the Commission was without power after the enactment of the Shipping Act of 1916 to regulate the rates, practices, tariffs, routes or business of the Petitioner. *Re I. I. S. N. Co.*, 24 Haw. 136. The Territorial Supreme Court likewise held in 1922, *In re Haw. Tel. Co.*, 26 Haw. 508, that the Commission was without power to regulate the rates or charges of telephone companies operating wholly within the Territory during the time that regulatory power over such companies was vested in the Interstate Commerce Commission. The validity of these decisions, for the purposes of this case, may be assumed and is not involved in these proceedings.

It was on the basis of these decisions that the Petitioner resisted the payment of all fees after the year 1923, and contended that *all powers* of the Commission with regard to the business of the Petitioner "in any respect or for any purpose" had been taken from the Commission (R. 8). The Petitioner's contentions in this regard were the subject of the reserved questions of law certified to the Supreme Court in the present proceedings in 1930 (R. 9). The Supreme Court in a clear and unassailable opinion (R. 13) held that the Shipping Act did not repeal by implication or otherwise the provisions of the Utilities Act of 1913 author-

izing the Commission to investigate all public utilities doing business in the Territory and to institute and prosecute appropriate proceedings before the Interstate Commerce Commission or the Shipping Board in appropriate cases. The Court states in this regard:

> "And if it is authorized, as it is by Act 89, to make an investigation which is complete and effective,—solely for the purpose of placing the facts before the body authorized to regulate—can this power or its exercise be held to be in conflict with the power of the shipping board to regulate or with the intent of Congress that the shipping board alone should regulate? We think not. In our opinion the power to investigate, to make complaint and to institute and to maintain proceedings before the shipping board is not inconsistent with the power of the shipping board to decide upon the merits of the complaint and to regulate as in its wisdom it may see fit to regulate. Under these circumstances, there can be no repeal by implication." (Op. of Sup. Ct., R. 24-25.)

The issue raised in the petition does not concern an encroachment of the Territory into a field exclusively within the power of Congress. The case involves two Acts of Congress which are perfectly harmonious. When Congress approved the Utilities Act of 1913 by its Act of March 28, 1916, it was contemplated that Federal statutes might from time to time extend Federal control to other utilities in the Territory. The enactment of the Shipping Act of September 7, 1916, is clearly consistent with the general plan for territorial supervision approved by Congress earlier in the year and does not repeal or withdraw that approval. *Panama R. R. Co. v. Johnson*, 264 U. S. 375.

The Petitioner concedes and it is well settled that under the principles announced in the *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, 481, the Shipping Act, 1916, and the Interstate Commerce Act should be given a like interpretation, application and effect (Pet. Br. 29). The application and effect of the Interstate Commerce Act in connection with the territorial powers of investigation have already had the attention of Congress and it can be shown almost to a mathematical certainty that it was the congressional intention not to preclude territorial investigations in the field covered by the Interstate Commerce Act. When the Act of March 28, 1916, which in its title and text referred to local railroads specifically, came before Congress for approval Congress added the proviso as follows:

> "*Provided, however,* That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce."

If the provisions of the Utilities Act of 1913 giving the Commission power to examine railroads and collect fees, were precluded by the Interstate Commerce Commission's occupancy of the field, the ratification by Congress and the proviso added would be wholly meaningless. If Congress did not intend to preclude territorial investigation of local railways because they were federally regulated by the Interstate Commerce Commission, it is clear that Congress by enacting the much less comprehensive Shipping Act of 1916 did not intend to preclude investigation of carriers subject to that Act. *U. S. Nav. Co. v. Cunard S. S. Co. (supra).* Therefore the Petitioner is seeking to obtain an interpretation of the Shipping Act of 1916 different from the interpretation and effect given by Congress itself to the

Interstate Commerce Act. For the Petitioner to succeed would necessarily involve the overruling by this Court of the principles announced in the *U. S. Nav. Co. v. Cunard S. S. Co. (supra)* decision.

III.

THE FEES ARE NOT EXCESSIVE OR UNREASONABLE AND THEIR COLLECTION DOES NOT RESULT IN A TAKING OF PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW.

The Petitioner seeks a determination that the fees sought to be collected are unreasonable and excessive (Pet. Br. p. 15), notwithstanding the findings of the courts below and the clear record to the contrary (R. 277-282; 335-336).

If the application of the Utilities Act of 1913 to the Petitioner was approved by Congress, then the question of the reasonableness of the amount of fees to be paid can in no way be an issue. The Congress of the United States may constitutionally empower the Territory to lay a non-discriminatory public utilities tax on all public utilities operating in the Territory, and the classification of taxpayers and the amount of tax is a matter for legislative determination.

New York Rapid Transit Corp. v. New York City, — U. S. —, decided March 28, 1938;

Cincinnati Soap Co. v. U. S., 301 U. S. 308, 323;

Talbot v. Silver Bow County Commissioners, 139 U. S. 438.

Upon the state of the record, the Petitioner, it is submitted, is in no position to raise any question as to the amount of fees. The Petitioner's theory, consistently maintained throughout the trial, and the appeal to the Territorial Supreme Court, was, that the recovery of fees could only be had upon the same theory as the recovery for services rendered at the request of the Petitioner under a *quantum meruit* count (R. 89, 100, 102, 116, 126-127, 128, 131, 278). No attempt was made by the Petitioner to show that the fees sought to be collected were known to be in an unnecessarily large amount (R. 131). No evidence was offered, nor was there any contention (R. 89, 94) that the fees would be in excess of what would reasonably be required to make the required investigations. The Petitioner persistently objected to the introduction of evidence as to what it had cost to make an investigation of Petitioner in prior years (R. 116, 123, 127), or as to what it might cost to presently investigate the Petitioner to determine the reasonableness of its rates (R. 128).

In one breath the Petitioner says the Commission is without power to investigate and hence to collect the fees; and in the next breath it says that the Commission cannot constitutionally collect the fees without first performing the services required by making an investigation of its business. It does not lie in the mouth of the Petitioner to refuse to pay fees and so prevent the Commission from investigating and then say that it is not obligated to pay the fees because the Commission has not done what the Petitioner said it could not do.

Respondent submits in any event that a comparison of the case at bar with the recent case of *Great Northern Railway Co. v. State of Washington, (supra)*, will

show the conclusion reached in that case in all respects is consistent with and supports the judgment entered herein.

In the case at bar the Petitioner, after paying fees for the years 1913-1922 inclusive (R. 69), paid no fees for the years 1923-1930, claiming no liability to do so. From the year 1913 to and including the year 1929 the Territorial Legislature from time to time made appropriations to permit the Commission to carry out its functions (R. 70, 107, 108, 109); and in fact it was necessary for the Legislature to appropriate $5,000 in 1929 for the very purpose of paying for legal services in connection with the immediate matter in litigation (R. 108). The record further shows that in 1921 and 1922, as well as in the subsequent years, the Commission never had on hand more than a very insignificant balance (R. 70) and there is clearly no evidence which would support a finding that the statute is in truth a revenue raising measure. The record further shows that in the years during which the Petitioner was paying its required fees the Commission had undertaken a comprehensive investigation of the Petitioner's rates and charges and that during the years 1916 and 1917 while such investigations were being made, the Commission incurred direct expenses in the amount of $7,239.58 (R. 125) and incurred indirect expenses attributable to the Petitioner in the amount of $5,385.20 (R. 125) or a total for the two years of $12,624.78. (See Analysis of Disbursements, Ex. C, R. 71). In the same two years the Petitioner paid to the Commission total fees of $5,063 (R. 69).

It further appears that no rate base has ever been established for the Petitioner (R. 133) and that upon objection of the Petitioner the Trial Court refused to ad-

mit evidence as to what an investigation of the business of the Petitioner would cost *because on the theory of the Petitioner* such evidence was not material (R. 192). The payment of $33,724 in fees for a period of eight years, during which Petitioner grossed $18,214,139 (R. 74), does not show any obvious excessiveness or unreasonableness. The most that can be said for the Petitioner's contention is that despite the experience of the Commission to the contrary, if the Petitioner pays the fees it might pay more than will be required to investigate it. That this is insufficient under the *Great Northern Railway Co. case (supra)* decision to establish the invalidity of the statute is authoritatively shown by the later unanimous decision of the Supreme Court in *Bourjois, Inc. v. Chapman*, 301 U. S. 183, which disposes completely of the Petitioner's present contention. The Court said in passing on the validity of an inspection fee sought to be collected in advance of inspections, at page 187,

> "It was obviously impossible then to determine whether the fees would prove to be in excess of the administrative requirement, *and in this situation it is sufficient if it is shown that the charges are not unreasonable on their face.* The mere fact that the fees imposed might exceed the cost of inspection is immaterial."

The legal position of the Petitioner is in no way similar to the position of the railroads in the *Great Northern Railway Co. case (supra)*. The ratification by Congress of the local utilities statute disposes of any complaint that the fees burden interstate or foreign commerce, or are attributable to business over which the Territory has no control. But even without congressional sanction, before there can be a declaration

of unconstitutionality of the fee statute on the ground of excessiveness, it must be shown as a fact that "what was known to be an unnecessary amount has been levied, or what has proved to be an unreasonable charge is continued."

Foote & Co., Inc. v. Stanley, 232 U. S. 494;
New Mexico ex rel. McLean v. Denver, etc. R. Co., 203 U. S. 38;
Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380;
Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345;
Great Northern Railway Co. v. State of Washington (supra);
Bourjois, Inc. v. Chapman (supra).

The Petitioner has wholly failed to make this showing and its petition raises no constitutional question requiring the consideration of this Court.

CONCLUSION

The unanimous decisions of the courts below were correct and accord with the decisions of this Court, and the reasons advanced in the petition herein lack the merit required by Rule 38, and therefore the petition should be denied.

Dated: Honolulu, T. H., July 2, 1938.

Respectfully submitted,

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URBAN EARL WILD,
Of Counsel.

APPENDIX

APPENDIX

Utilities Act of 1913

This statute was originally Act 89 of the Session Laws of Hawaii 1913, as amended by Act 127 of the Session Laws of Hawaii 1913, and took effect on July 1, 1913. This Act together with certain amendments which are not material to the case at bar became Chapter 132 of the Revised Laws of Hawaii 1925. The chapter is summarized in Petitioner's Brief, Appendix pages i-vi.

For the convenience of the Court there is shown hereunder the original sections of said Act 89, Sessions Laws of Hawaii 1913, and the corresponding sections in which they subsequently appear in the Revised Laws of Hawaii 1925.

Act 89, S.L. Haw. 1913	*Revised Laws of Hawaii 1925*
Section 1	Section 2189
2	2190
3	2191
4	2192
5	2193
6	2194
7	2195
8	2196
9	2197
10	2198
11	2199
12	2200
13	2201
14	2202
15	2205

Act 89, S.L. Haw. 1913	*Revised Laws of Hawaii 1925*
16	2206
17	2207
18	2208
19	2209
20	2210

Section 13, Act 89, S. L. Haw. 1913; Section 2201, R. L. H. 1925, provides:

"*Sec. 2201. May make recommendations and bring suits.* If the commission shall be of the opinion that any public utility is violating or neglecting to comply with any territorial or federal law, or any provision of its franchise, charter, or articles of association, if any, or that changes, additions, extensions, or repairs are desirable in its plant or service in order to meet the reasonable convenience or necessity of the public, or to insure greater safety or security, or that any rates, fares, classifications, charges or rules are unreasonable or unreasonably discriminatory, or that in any way it is doing what it ought not to do, or not doing what it ought to do, it shall in writing inform the public utility of its conclusions and recommendations, shall include the same in its annual report, and may also publish the same in such manner as it may deem wise. The commission shall have power to examine into any of the matters referred to in section 2193, notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its

duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the Territory, or in the name or names of any complainant or complainants, as it may deem best."